

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROY MOMII and U.S. POSTAL SERVICE,  
POST OFFICE, Denver, Ill.

*Docket No. 96-1228; Submitted on the Record;  
Issued March 18, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant received a \$1,305.55 overpayment of compensation for the period January 10, 1993 to July 22, 1995; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to waive recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every month.

The Board has duly reviewed the case record in the present appeal and finds that appellant received a \$1,305.55 overpayment of compensation for the period January 10, 1993 to July 22, 1995.

In the present case, the record contains evidence which shows the employing establishment failed to deduct \$1,305.55 in health premiums from appellant's compensation during the period January 10, 1993 to July 22, 1995, a period in which appellant was covered by his health plan. Therefore, appellant received \$1,305.55 in compensation to which he was not entitled. For this reason, the Office, in its December 18, 1995 decision, properly determined that appellant received a \$1,305.55 overpayment.<sup>1</sup>

The Board further finds that the Office did not abuse its discretion by refusing to waive recovery of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.<sup>2</sup> These statutory guidelines are found in section 8129(b) of the Federal Employees' Compensation Act which

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<sup>1</sup> The Office had advised appellant of its preliminary determination in a notice dated September 18, 1995. Appellant received compensation in connection with a January 22, 1992 chronic lumbosacral strain.

<sup>2</sup> See *Robert Atchison*, 41 ECAB 83, 87 (1989).

states: “Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.”<sup>3</sup> Since the Office found appellant to be without fault in the matter of the \$1,302.55 overpayment, then, in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience.<sup>4</sup>

The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth in sections 10.322 and 10.323, respectively, of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual’s assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).<sup>5</sup> Section 10.323 provides, generally, that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with “severe financial hardship” determined by using the same criteria set forth in section 10.322; or (2) the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.<sup>6</sup>

Appellant has not established that recovery of the overpayment would defeat the purpose of the Act because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the allowable resource base. Appellant provided information indicating that he has a monthly income of \$3,696.00 and monthly expenses of \$2,222.00 such that his monthly income exceeds his monthly ordinary and necessary expenses by a substantial amount. As appellant’s current income exceeds his current ordinary and necessary living expenses by more than \$50.00 appellant has not shown that he needs substantially all of his current income to meet current ordinary and

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<sup>3</sup> 5 U.S.C. § 8129(b).

<sup>4</sup> Appellant argued that the overpayment should be waived because he was not found to be at fault in its creation but he would only be entitled to such waiver if it were shown, under the standards described below, that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

<sup>5</sup> 20 C.F.R. § 10.322(a). Section 10.322 defines the terms “income,” “expenses” and “assets.” 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the “defeat the purpose of the Act” standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; *see George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; *see* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)+(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

<sup>6</sup> 20 C.F.R. § 10.323.

necessary living expenses.<sup>7</sup> Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of the Act, it is not necessary for the Office to consider the second prong of the test, *i.e.*, whether appellant's assets do not exceed the allowable resource base.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt<sup>8</sup> or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.<sup>9</sup>

Because appellant has failed to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, he has failed to show that the Office abused its discretion by refusing to waive the overpayment. Appellant suggested that the overpayment should be recovered from his insurance company, but he did not adequately explain the basis for this argument.

The Board further finds that the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every month.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."<sup>10</sup>

The record supports that, in requiring repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every month, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting \$50.00 from appellant's compensation payments every month.

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<sup>7</sup> See *supra* note 5 and accompanying text.

<sup>8</sup> Whether a claimant experiences severe financial hardship in attempting to repay an overpayment is determined by using the same criteria set forth in 20 C.F.R. § 10.322; see *supra* note 5 and accompanying text.

<sup>9</sup> See *William J. Murphy*, 41 ECAB 569, 571-72 (1989).

<sup>10</sup> 20 C.F.R. § 10.321(a). See *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

The decision of the Office of Workers' Compensation Programs dated December 18, 1995 is affirmed.

Dated, Washington, D.C.  
March 18, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member